Supreme Court, U.S.
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No. 96-1649

In The

Supreme Court of the United States

October Term, 1996

MIDWEST PRIDE IV AND JAMES KEATON,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

On Petition For A Writ Of Certiorari To The Ohio Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Do the First, Sixth and Fourteenth Amendments to the United States Constitution require a jury instruction in an obscenity prosecution to the effect that if the jury cannot determine the contemporary community standards it must acquit?

RESPONDENT'S BRIEF IN OPPOSITION

Respondent State of Ohio respectfully requests this court to deny the petition for a writ of certiorari seeking review of a denial of a petition for a writ of certiorari by the Supreme Court of Ohio of a decision of the Court of Appeals, Fayette County, Ohio, upholding a jury trial conviction for pandering obscenity in the Common Pleas Court, Fayette County, Ohio.

STATEMENT OF THE CASE

Undercover officers of the Fayette County Sheriff's Office and the South Central Ohio Task Force purchased adult videotapes from the petitioners during August, 1993. Indictments were obtained for pandering obscenity. A jury trial commenced where the state entered the videotapes into evidence but presented no other evidence to establish the contemporary community standards of the *Miller* test. The petitioners moved the trial court for a jury instruction to the effect that if from the evidence presented the jury could not determine the contemporary community standards it must acquit. The trial court refused the instruction. It did however instruct the jury that all elements of both the state statute for pandering obscenity and the *Miller* test must be proven beyond a reasonable doubt. The jury found the petitioners guilty.

REASONS WHY THE PETITION SHOULD BE DENIED

The petitioners contend the First, Sixth and Fourteenth Amendments require additional safeguards from those now in place for an obscenity prosecution. The essence of their argument is set forth in their petition on page 12: "Because of the unusual role the jury occupies in being permitted to make a factual finding not on the evidence adduced but rather on some assumed knowledge on its part, the instructions given to it by the court

are particularly significant." We disagree the safeguards presently in place need enhancement.

In *Miller v. California*, 413 U.S. 15 (1973), this Court set forth a three prong test which must be met before a jury may find expressive material obscene: 1) whether the average person, applying contemporary community standards would find the work, taken as a whole, appeals to the prurient interest; 2) whether the work depicts in a patently offensive way, sexual conduct specifically defined by the applicable state law; and 3) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. *Id.* at 24. The first two prongs apply the contemporary community standard and the third prong applies the reasonable person standard. The first two prongs set forth restrictions on the type of material that may be considered to be obscene and the third prong sets forth a second restriction as to the quality of material that may be found to be obscene.

As to the first two prongs of the *Miller* test the Court stated "we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. The state offense must be limited to works which, taken as a whole, appeal to the prurient interest." *Id.* at 24. The Court further set forth examples which show the intent of the second prong of the test. A work can only be considered obscene if it shows: a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; and b) patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.* at 25. Therefore, it is clear that the first and second prongs of the *Miller* test are themselves a limiting test on the scope of material which may be considered to be obscene. The Miller test restricts the type of material to that which is "Hard-Core Pornography."

The second restriction that *Miller* imposes in an obscenity case is that no material may be found to be obscene unless it lacks serious literary, artistic, political or scientific value. This prong of the test requires the application of the reasonable person standard. Thus, only works without serious value can be considered obscene.

This Court has said "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. If the inability to define regulated materials with ultimate, god-like precision altogether removes the power of the States or congress to regulate, then 'hard core' pornography may be exposed without limit to the juvenile, the passerby, and the consenting adult alike . . . " *Miller*, supra, at 27. The Court has further said "The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand concept of the First Amendment and its high purpose in the historic struggle for freedom. It is a misuse of the greatest guarantees of free speech and free press . . . The First Amendment protects works which, taken as a whole, have serious literary, artistic, political or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent . . . But the public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter." *Miller* at 34. Also, "Mr. Justice Brennan finds 'it is hard to see how state-ordered regimentation of our minds can ever be forestalled . . . These doleful anticipations assume that courts cannot distinguish commerce in ideas, protected by the First Amendment, from

commercial exploitation of obscene material." *Miller* at 36.

Therefore, as the *Miller* test places adequate restrictions on the type of material that may be considered to be obscene to safeguard non-obscene material from being found obscene, the First Amendment to the United States Constitution does not require further safeguards to ensure non-obscene material will not be found obscene.

The Fourteenth Amendment Due Process Clause places upon the prosecution the burden of proving every element of a criminal charge beyond a reasonable doubt. A jury must be so instructed. It was so instructed herein as to both the state statute and the *Miller* test. The Due Process Clause does not require instructions in the negative, i.e. that if the jury cannot find an element has been proven beyond a reasonable doubt it must acquit. Rather the standard is always given that all elements must be established beyond a reasonable doubt and that if any element is not so proven then the jurors must acquit. The petitioners attempt to make a distinction for obscenity cases but fails to show how obscenity cases differ from other criminal cases in the area of jury instructions under the Fourteenth Amendment. The Court in *Miller* stated "the adversary system with lay jurors as the usual ultimate fact finders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law." *Id.* at 30. The limiting instructions, it is proposed, are the restrictions set forth above in the *Miller* test, which the trial court herein gave to the jury. It is clear that the *Miller* Court had no problem letting the jurors do as they do in many other criminal cases, i.e., determine for themselves the standards of their community. In *Smith v. United States*, 431 U.S. 291 (1977), this Court found that jurors were not to be permitted to be asked of their understanding of the contemporary community standard on voir dire. The Court found that the issues of appeal to the prurient interest and patent offensiveness are "fact

questions for the jury, to be judged in light of the juror's understanding of community standards." *Id.* at 309.

Therefore the Due Process Clause of the Fourteenth Amendment does not require the instruction requested by the petitioners.

CONCLUSION

The First Amendment does not require the requested instruction of the petitioners as there are sufficient safeguards in place to limit the permissible scope of material subject to regulation to "Hard-Core Pornography" that is without any serious value. Also, the Fourteenth Amendment does not require the requested instruction as jurors must now be instructed that all elements of the offense must be proven beyond a reasonable doubt. In the apt words of Mr. Chief Justice Warren, " . . . appellant in this case was plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the states and the federal government can constitutionally punish such conduct. That is all these cases present to us, and that is all we need to decide." *Roth v. United States*, 354 U.S. 476 (1957) (concurring opinion). The petition for a writ of certiorari should be denied.

Respectfully submitted,

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